Supreme Court, U.S.
FILED
MAY 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WARREN LEE HARRIS,

Petitioner,

v.

MARVIN REED, Warden and NEIL F. HARTIGAN, Attorney General of the State of Illinois,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

When a state court opinion is unclear whether it rests on adequate and independent state grounds or the merits of a federal constitutional claim, should that ambiguity be resolved in favor of affording habeas review of the constitutional claim?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, holding that the Illinois Appellate Court probably intended to find a waiver of the Petitioner's ineffective assistance of counsel constitutional claim, is reported at *Harris* v. *Reed*, 822 F.2d 684 (7th Cir. 1987). (Joint Appendix ("J.A.") at 68.) The contrary holding of the District Court that the state court did not base its decision on a finding that the ineffective assistance claim had been waived is reported at *Harris* v. *Reed*, 608 F. Supp. 1369 (N.D. Ill. 1985). (J.A. at 15.) The opinion of the District Court finding that Petitioner was not denied effective assistance of counsel is unpublished and is found in the Joint Appendix at 45.

The order of the Illinois Appellate Court affirming the denial of Petitioner's state court post-conviction relief is unpublished and is found in the Joint Appendix at 9. The order of the Illinois Appellate Court affirming Petitioner's conviction on direct appeal is unpublished and is found in the Joint Appendix at 5.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 2101(c). Petitioner seeks review of the June 12, 1987 decision of The United States Court of Appeals for the Seventh Circuit. A Petition for Rehearing with Suggestion for Rehearing on *en banc* was filed on June 26, 1987 and denied on July 20, 1987. A Petition for Writ of Certiorari was filed on October 16, 1987. On March 7, 1988, the Court granted the Petition as to Question 1. *Harris* v. *Reed*, ___ U.S. ___, 108 S.Ct. 1107(1988).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment VI to the United States Constitution:

> In all criminal prosecutions an accused shall enjoy the right to a speedy public trial, by an impartial jury of

the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the *Assistance of Counsel for his defense*. (Emphasis added).

Section 2254(a) of title 28 of the United States Code:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

The Trial of Warren Harris In December 1977, Petitioner was tried for murder in the Circuit Court of Cook County, Illinois. A public defender assigned to represent Petitioner told the jury in opening statement that the evidence would show that two witnesses saw another man, Melvin McWhorter, flee from the scene of the crime and that these two persons separately identified Melvin McWhorter in a police lineup as the person they saw running away from the night-time shooting. (J.A. at 3.) The trial record shows that these two witnesses were present in the courtroom. (Petitioner's Habeas Exh. 1 (Trial Transcript), p. 23.)

After the trial court denied Petitioner's motion for directed verdict, the public defender rested Petitioner's case without presenting any witnesses, including the two who separately identified McWhorter, and offered no evidence supporting the theory proclaimed in the opening statement. (Petitioner's Habeas Exh. 1, pp. 126, 130.)

Defense counsel also failed to offer into evidence a stipulation that materially impeached the prosecution's sole eyewitness who testified that, while driving his car near the scene of the shooting, he caught a fleeting glimpse of Petitioner, whom the witness had seen only once before approximately two years before the trial. (Petitioner's Habeas Exh. 1, pp. 122-24, 130.) The entire trial, from opening statements to closing argument, comprises only 130 pages of double-spaced transcript. (Petitioner's Habeas Exhibit 1, pp. 25-154.) Petitioner was convicted of murder and later sentenced to 50 to 100 years in prison.

Post-Conviction Review in the State Courts. Petitioner's conviction was upheld on direct appeal against a challenge to the sufficiency of the evidence. (J.A. at 5.) Petitioner then filed a Petition for Post-Conviction Relief in the Circuit Court of Cook County alleging ineffective assistance of trial counsel. He had not raised this issue on direct appeal. The state trial court denied this Post-Conviction Relief on the merits, stating:

> . . . I have considered all aspects, I have heard your arguments, I have heard the arguments of the state, and it is the opinion of the court that the defendant had been properly represented, that he had been given proper consideration on his appeal, both by the appellate court and the supreme court, and accordingly, this court is hereby denying your petition, and it is hereby dismissed.

(Report of March 19, 1981 Proceedings, Circuit Court of Cook County, reported in *Harris* v. *Reed*, 608 F. Supp. 1369, 1376 (N.D. Ill. 1985); J.A. at 26-27.)

On appeal, the Illinois Appellate Court affirmed in an unpublished order.[1] (J.A. at 9.) This order first notes that

[1] This order was issued pursuant to Illinois Supreme Court Rule 23

(Footnote continued on next page)

Petitioner failed to raise his ineffective assistance claim on direct appeal and then, without making any finding of waiver, proceeds to discuss and resolve the case on the merits of the ineffective assistance claim. (J.A. at 12-14.)

Federal Habeas Review. Petitioner filed a *pro se* petition for writ of habeas corpus in the United States District Court for the Northern District of Illinois claiming he had been denied effective assistance of counsel. The State moved to dismiss, arguing that Petitioner had waived that claim by failing to urge it on direct appeal. The District Court, however, found that the Illinois Appellate Court had excused Petitioner's procedural default by addressing the merits of his ineffective assistance claim. *Harris* v. *Reed*, 608 F. Supp. 1369, 1376-78 (N.D. Ill. 1985). (J.A. at 30.) The District Court then set the matter for trial on the merits of Petitioner's claim and appointed one of the undersigned to represent him. Trial was held in November, 1985. The District Court found that the case was "very close," but denied Petitioner's claim. (J.A. at 65.)

On appeal to the United States Court of Appeals for the Seventh Circuit, the State again argued, as a threshold matter, that the District Court erred in finding the state court waived Harris' procedural default. The majority of the panel agreed after first observing that the state court order is ambiguous:

(Footnote continued from previous page)
(Ill. Rev. Stat. ch. 110A, § 23 (1981)) which states that a case shall be disposed of by an "opinion" only when the panel deciding the case determines that it (1) involves a new legal issue, (2) involves a conflict between appellate courts, (3) is of substantial public interest, or (4) contributes significantly to legal literature. All other cases are to be disposed of by an unpublished order.

> Here, we have no such clear expression of intent. There is neither an explicit finding of waiver nor an express intention to ignore waiver. The order is ambiguous because the Court addressed the merits of some of the Petitioner's claims which it clearly implied had been waived.

822 F.2d at 687. (J.A. at 72.) The majority then stated that it "should try to assess the state court's intention to the extent this is possible." *Id.* at 687. (J.A. at 72-73). The majority concluded that a "full reading of the order suggests to us that the Appellate Court intended to find all grounds waived except that pertaining to alibi witnesses." *Id.* at 687. (J.A. at 73.) Accordingly, the majority held it could not review the merits of Harris' ineffective assistance claim.

In a concurring opinion, Judge Cudahy disagreed with the majority's attempt to divine the unspoken intent of the Illinois Appellate Court. Judge Cudahy argued in favor of a presumption that a waiver not clearly found has been condoned by the state court. *Id.* at 687. (J.A. at 73.) As for the merits of Harris' ineffective assistance claim, Judge Cudahy found that "[a]lthough the matter is very close," he agreed with the District Court. *Id.*

SUMMARY OF ARGUMENT

Although federal courts are empowered to review state court criminal convictions for violations of federal constitutional rights, such review is not without limits. When a state court decision rests on adequate and independent state grounds, federal courts must respect that determination absent a showing of cause and prejudice by the petitioner. *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

Difficulty arises when, as here, the state court decision is unclear whether it rests on adequate and independent

state grounds. Lower federal courts have addressed the problem of ambiguous state court decisions in the context of federal habeas review, but this Court has not yet done so. The Court, however, has addressed the problem in the context of a direct appeal. In *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983), the Court held that, absent a "plain statement" in the state court opinion that it relied on an adequate and independent state ground, the Court would presume in favor of preserving the federal claim for direct review.

The *Michigan* v. *Long* approach has been used by some lower federal courts in habeas cases. Other lower courts have used conflicting approaches.[2] Some guess at what the state court intended. The Court of Appeals below, for example, observed that the state court order was "ambiguous" and felt compelled to surmise what the order "suggested."

The question in this case narrows to: should the "plain statement" rule of *Michigan* v. *Long*, a direct appeal case, apply to habeas cases? Because habeas review is broader than direct review, we respectfully suggest that *a fortiori* the *Long* rule applies.

Other approaches, to the extent that they have been used by the lower courts, do not promote comity, accuracy, or uniformity in interpreting federal constitutional law. The approach that most respects the interests of comity and the writ of habeas corpus is the *Michigan* v. *Long* plain statement rule.

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[2] *See, e.g., Meadows* v. *Holland*, 831 F.2d 495 (4th Cir. 1987) (*en banc*), pending before the Court on petition for certiorari, No. 87-6063.

We are not suggesting that the plain statement rule be changed. We suggest only that the rule embodies substantive constitutional law that should be followed whether the form of federal review be direct appeal or habeas.

ARGUMENT

I. ABSENT A PLAIN STATEMENT BY A STATE COURT THAT ITS DECISION RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND, FEDERAL COURTS SHOULD AFFORD HABEAS REVIEW OF FEDERAL CLAIMS.

Federal habeas review of state court convictions under 28 U.S.C. § 2254(a) is both a great protector of individual liberty and a source of friction in the smooth operation of our dual system of federal and state courts.[3] By its very nature, the remedy involves federal interference with state court decisions to ensure uniform application of

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[3] The writ of habeas corpus has been a protector of individual liberty for centuries. Yackle, *Postconviction Remedies*, § 4, pp. 7-15 (1981). When the nation was founded, the writ was held in such high regard that its continued existence was mandated in the Constitution itself—even before the Bill of Rights was drafted. Constitution, Article I, § 9; *The Federalist Papers*, No. 84 (Hamilton) (New American Library Edition, 1961).

The Judiciary Act of 1789 authorized federal courts to issue the writ, but limited its use to federal convictions. *See Stone* v. *Powell*, 428 U.S. 465, 474-75 (1976) (history of writ recounted). In 1867, after the Civil War, Congress enacted legislation that allowed federal courts to review state court convictions. *Id.* at 475. This legislation was the predecessor of 28 U.S.C. § 2254(a), which presently provides that federal courts shall:

> [E]ntertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

federal law and freedom from unconstitutional restraint. The judicial task of balancing important considerations of comity, uniformity, and individual liberties has been fraught with difficulties and uneven results.

To avoid unnecessary interference with state court judgments, the rule has developed in 28 U.S.C. § 2254(a) cases that federal courts ordinarily should not grant habeas review if the state decision upholding the petitioner's conviction rests on adequate and independent state grounds. *Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977). The Court adopted this doctrine of adequate and independent state grounds from the jurisprudence of Supreme Court appellate jurisdiction. In direct appeal cases, the Court long has held that it has no jurisdiction to review directly the decision of a state's highest court if the decision rests on adequate and independent state grounds. *See Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983); *Henry* v. *Mississippi*, 379 U.S. 443, 446 (1965); *Herb* v. *Pitcairn*, 324 U.S. 117, 125 (1945).[4] A procedural default, such as failure to make a timely objection at trial or to raise an issue on appeal, ordinarily constitutes an adequate and independent state ground that, if relied upon by the state court, will bar federal review of the state court decision even if it discusses federal issues.

Although the doctrine of independent and adequate state grounds creates a jurisdictional bar in direct review

[4] Justice Jackson explained in *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945), that the doctrine is premised on the belief that the Supreme Court should not issue advisory opinions that merely correct the state court's view of federal law but, because of independent state grounds, do not alter the judgment. Others have argued that the rationale for the doctrine is that the federal question is mooted by the existence of a state ground which will support the judgment. Nowak, Rotunda and Young, *Constitutional Law* 95 (2nd ed. 1983).

cases, the Court never has held that the doctrine limits the power of federal courts to provide habeas corpus relief. In *Fay* v. *Noia*, 372 U.S. 391, 426-35 (1963), the Court recognized that federal court jurisdiction to provide habeas relief is much broader than its jurisdiction to review state court decisions on appeal. Tracing the origins of the doctrine of independent and adequate state grounds to the Judiciary Act of 1789, which imposed limitations on the Court's appellate jurisdiction, the Court held that doctrine did not limit the power of federal courts to afford habeas relief. 372 U.S. at 398-99.

Although the doctrine does not create a jurisdictional bar in habeas cases, it does embody important comity considerations that limit the discretion of federal courts to provide habeas relief in some instances. In *Fay* v. *Noia*, the Court held that comity considerations preclude a federal court from affording habeas review of state convictions when the petitioner deliberately by-passes state procedures or remedies.

Fourteen years later, the Court substantially expanded the circumstances under which the doctrine of independent and adequate state grounds ordinarily will preclude federal habeas review. In *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), the habeas petitioner failed to object at trial to the admissibility of his out-of-court confession. The Court, abandoning the "deliberate by-pass" rule, held that the petitioner's failure to comply with the state law contemporaneous objection rule was an adequate and independent state ground that barred federal review unless "cause and prejudice" could be established for the procedural default. 433 U.S. at 87. The Court found that the cause and prejudice standard would encourage the state court trial to be the "main event," promote greater

respect for state court opinions, and further the interests of "finality" in criminal adjudications. *Id.* at 88-90.

Although *Sykes* abandoned *Noia's* "deliberate by-pass" rule, it left intact *Noia's* holding that federal courts have the power to review state court decisions regardless of any adequate and independent state ground. *See Sykes*, 433 at 83, 87-88. Later decisions by the Court have reiterated this principle. *Reed* v. *Ross*, 468 U.S. 1, 9 (1984) (federal courts empowered under 28 U.S.C. § 2254 to look beyond state procedural forfeiture and consider constitutional claim). Therefore, when a federal court declines habeas review, whether under the earlier deliberate by-pass rule or under the current "cause and prejudice" test, it does so not because it lacks jurisdiction, but for policy reasons designed to promote federal-state comity and finality.

Later decisions have expanded application of *Sykes'* "cause and prejudice" rule to procedural defaults involving the determination of "guilt or innocence," *Engle* v. *Issac*, 456 U.S. 107, 129 (1982), and to defaults on appeal. *Murray* v. *Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 2648 (1986); *Smith* v. *Murray*, 477 U.S. 527, 106 S.Ct. 2661, 2665-66 (1986). In each of these cases, the state courts never had an opportunity to address petitioner's federal claim because of his procedural default.

The situation is quite different when the state court addresses and resolves the merits of a petitioner's federal claim notwithstanding a prior procedural default. This situation can arise when, as here, the petitioner fails to raise the federal issue in his direct state court appeal but does raise it in a subsequent state post-conviction petition. The situation also can arise when the petitioner defaults by not raising the issue on a timely basis at trial

but does raise it on appeal. In these situations, where the state court addresses the petitioner's federal claim notwithstanding a procedural default, the state court necessarily determines that the policies underpinning its procedural rule are unworthy of vindication under the particular circumstances of the case. *Cooper* v. *Wainwright*, 807 F.2d 881, 886 (11th Cir. 1986), *reh'g denied*, 811 F.2d 612 (11th Cir. 1987), *cert. denied sub nom.*, *Dugger* v. *Cooper*, ___ U.S. ___, 107 S.Ct. 2183 (1987).

Federal courts respect this determination and serve the comity encouraged by *Sykes* and its progeny by affording habeas review of the state court's decision on the merits of the petitioner's federal claim. As stated in *County Court of Ulster County* v. *Allen*, 442 U.S. 140, 154 (1979):

> If neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some procedural rule, a federal court implies no disrespect for the state by entertaining the claim.

In *Ulster County*, the Court allowed federal habeas review of a petitioner's federal constitutional claim because, even though "the state courts were less than explicit in their reasons" for affirming petitioner's convictions, it was apparent that the convictions had been affirmed on the merits of the constitutional claim and not on the basis of the procedural default. 442 U.S. at 148-49. *See also Warden* v. *Hayden*, 387 U.S. 294, 297 n.3 (1967) (where state appellate court reached the merits of search and seizure issue even though not raised at trial, then federal claim could be considered on habeas review).

The difficulty arises when it is not clear whether the state court relied on the merits, the procedural default, or both. Before this case, the Court has not had the opportunity to resolve the difficulty presented by ambiguous

state court opinions in the context of a federal habeas corpus case. The lower courts, however, have struggled with this problem. Several approaches have emerged.

Under the first approach, the federal court presumes a state court decision is based on a state law procedural default rather than the merits when faced with an unclear opinion or summary affirmance if the prosecution has argued a procedural default. This is the approach used by the courts in *Martinez* v. *Harris*, 675 F.2d 51, 54 (2nd Cir. 1982), *cert. denied*, 459 U.S. 849 (1982); *Raper* v. *Mintzes*, 706 F.2d 161, 174 (6th Cir. 1983) and *Shepard* v. *Foltz*, 771 F.2d 962, 965 (6th Cir. 1985).

The second approach involves the federal court attempting to interpret the state court opinion. Federal courts have inquired whether the state court reached "the gist of the federal constitutional question" (*Puleio* v. *Vose*, 830 F.2d 1197, 1200 (1st Cir. 1987), *cert. denied*, ___ U.S. ___, 56 U.S.L.W. 3683, (1988)), whether the state procedural default was a "substantial basis" for the state court decision (*Hockenbury* v. *Sowders*, 620 F.2d 111, 115 (6th Cir. 1980), *reh'g denied*, 633 F.2d 443 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981)), or whether the state court probably intended to rely on a procedural default. *Harris* v. *Reed*, 822 F.2d 684, 687 (7th Cir. 1987).

Under the third approach, the federal court decides the merits of the federal claim unless the state court relied exclusively on the procedural default. If the state court bases its decision on both procedural default and the merits, the federal court reviews the merits. *Braiser* v. *Douglas*, 815 F.2d 64, 65 (10th Cir. 1987), *cert. denied*, ___ U.S. ___, 107 S.Ct. 3271 (1987); *Rogers* v. *McMullen*, 623 F.2d 1185, 1188 (11th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983); *Thompson* v. *Estelle*, 642

F.2d 996, 998 (5th Cir. 1981). *See also*, Wilkes, *Federal and State Postconviction Remedies and Relief*, § 8-24, p. 199 (2nd ed. 1987).

A fourth approach, which we advocate, advances the *Sykes* comity considerations, promotes uniformity of federal law, and preserves the vitality of "the Great Writ."[5] Under this approach, the federal court invokes the *Sykes* "cause and prejudice" test only if the state court decision contains a plain statement that it rests on an adequate and independent state ground. Absent such a plain statement, the federal court provides habeas review without invoking the *Sykes* "cause and prejudice" test. In other words, when a state court decision is not clear that it rests on an adequate and independent state ground, the federal court presumes that the decision rests on the merits. *Meadows* v. *Holland*, 831 F.2d 493, 504, 507 (4th Cir. 1983) (*en banc)* (dissenting opinion of Judges Winter and Phillips); *Harris* v. *Reed*, 822 F.2d 684, 687 (Cudahy, J., concurring) (should invoke a presumption that waiver not clearly found had been condoned); *Mann* v. *Dugger*, 817 F.2d 1471 (11th Cir. 1987) *vacated for rehearing en banc*, 828 F.2d 1498 (11th Cir. 1987) (Clark, J., specially concurring) (should adopt plain statement rule in habeas cases); *Henry* v. *Wainwright*, 686 F.2d 311, 314, 314 n.4 (5th Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983) (where state procedural default not clear, state court presumed to have reached merits).

This fourth approach effectively adopts the "plain statement" rule set forth in *Michigan* v. *Long*, 463 U.S. 1032

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[5] *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95, 2 L.Ed. 554 (1807) (per Marshall, C.J.). *See also Smith* v. *Bennett*, 365 U.S. 708, 712 (1961) (per Clark, J.) (habeas corpus is "the common law world's 'freedom writ'").

(1983), where the Court addressed an ambiguous state court opinion in the context of deciding whether jurisdiction existed to review a decision of the Supreme Court of Michigan, which had reversed a conviction for possession of marijuana on the ground that the police search of the defendant's automobile violated the Untied States Constitution. In its decision, the Supreme Court of Michigan also discussed an adequate and independent state ground for reversing the conviction. On appeal to the United States Supreme Court by the State of Michigan, the defendant argued that the Court lacked jurisdiction to consider the federal constitutional issues because an adequate and independent state ground supported the Michigan Supreme Court's decision. 463 U.S. at 1037-38.

This Court began its analysis in *Long* by stating that it is "incumbent upon this Court . . . to ascertain for itself . . . whether the asserted non-federal ground independently and adequately supports the judgment." *Id.* at 1038 [quoting *Abie State Bank* v. *Bryan*, 282 U.S. 765, 773 (1931)]. The Court added that:

> Although we have announced a number of principles in order to help us determine whether various forms of references to state law constitute adequate and independent state grounds, we openly admit that we have thus far not developed a satisfying and consistent approach for resolving this vexing issue.

Id. The Court then identified three methods it had used in the past to deal with unclear state court decisions: (1) outright dismissal; (2) vacation and remand to the state court for clarification; and (3) federal court re-examination of state law. The Court concluded that none of the approaches were satisfactory. Re-examining state law was unsatisfactory because it requires a federal court to interpret state law with which it may not be familiar and

which may not have been briefed adequately by the parties. *Id.* at 1039. Vacation and remand for clarification was unsatisfactory because it fostered delay and inefficiency and placed additional burdens on state courts. *Id.* at 1042. Finally, outright dismissal was contrary to the need to develop uniformity in federal law. *Id.*

In place of these three *ad hoc* approaches, this Court set forth a uniform principle:

> Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal procedents as it would on the precedents of all other jurisdictions, *then it need only make clear by a plain statement* in its judgment or opinion that the federal cases are being used only for the purpose of guidance and do not compel the result that the court has reached.
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> * * *
>
> We believe that such an approach will provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law. "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. *But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this court of the validity under the federal constitution of state action.*"

463 U.S. at 1041-42 [quoting *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 557 (1940)] (emphasis added). The

Court concluded that it should review the federal constitutional issue because there was no plain statement that the state court decision rested on adequate and independent state grounds. *Id.* at 1044.

After *Long*, the Court applied the plain statement rule in deciding whether a procedural default on direct appeal constituted an adequate and independent state ground. *Caldwell* v. *Mississippi*, 472 U.S. 320, 327 (1985). The rule now exists in direct appeal cases that, absent a plain statement by the state court that its decision rests on adequate state substantive law (as in *Long)* or adequate state procedural law (as in *Caldwell),* the Court will review the federal issue.

The policy considerations that prompted adoption of the plain statement rule in direct appeal cases apply with equal or greater force in habeas cases. The need for uniformity in federal constitutional law is no less compelling in cases that may reach the federal courts by way of habeas rather than direct review. The policy considerations articulated in *Sykes* also are well served by applying the plain statement rule to habeas cases. The other approaches, to the extent they involve second-guessing what a state court meant or presuming in favor of waiver, hardly promote comity, finality, or accuracy. Instead, these approaches involve intrusive, and possibly inaccurate, interpretations of state court decisions that invariably lead to further litigation.

Any approach that involves second-guessing of state court decisions or presuming in favor of waiver not only disserves the *Sykes* policy considerations but also seriously impairs the rights of habeas petitioners. Although *Sykes* restricted *Noia's* more liberal allowance of the Great Writ, the Writ remains a fundamental right to

freedom that should not be left to the mercy of ambiguous state court rulings.

When ambiguity exists as to whether a state court opinion rests on adequate and independent grounds, it should be resolved in favor of preserving federal review of the federal constitutional claim. This presumption in favor of federal review follows from the right of a habeas petitioner to have his federal constitutional rights adjudicated by a federal court even if passed upon by a state court. *See Brown* v. *Allen*, 344 U.S. 443, 458 (1953) (state adjudication of federal right not *res judicata* in federal habeas review). Such a presumption also makes sense in light of the strong policy that federal rights should not be lost to unclear state decisions. (*See Long*, at 1041.)

Moreover, the state court, not the habeas petitioner, controls the content of its decision. State judges have the right and duty to uphold federal law; they know that federal habeas review exists. If a state court desires to base its decision on a state law procedural forfeiture and thereby foreclose federal habeas review, it may do so simply by including a plain statement to that effect. The risk that an ambiguous state court decision may be reviewed by a federal court should be placed on the state court that created the ambiguity, and not on the hapless defendant.

The burden on state courts of following the plain statement rule is minimal. That burden already exists in direct review cases. State courts know that to foreclose direct review by this Court they must include in their decisions a plain statement that the judgment rests on adequate and independent state grounds. It is no more intrusive to require such a plain statement in habeas cases. Indeed, it is far more intrusive when federal courts undertake to

interpret state law or speculate as to the intent of ambiguous state court decisions. Comity considerations are disserved when the federal court, as a result of incorrectly guessing the basis for a state court's decision, fails to respect a state court's determination that the polices underpinning its procedural rules are unworthy of vindication under the particular circumstances of the case. Thus, the benefits of applying *Long's* plain statement rule to habeas cases far outweigh any arguable detriment to our dual court system.

Furthermore, what difference does it make to the proper working of our dual court system whether an ambiguous state decision is brought into the federal courts by direct appeal to the Supreme Court or by a habeas petition to a federal district court? Should not the ambiguous state decision be subject to the same rules of interpretation or deference in either case? Should not the United States Constitution and the states' right of self-government be given equal respect regardless of the method of federal review? We respectfully suggest that *Long's* plain statement rule should apply in both habeas and direct review cases.

Many judges and commentators agree. Judge Cudahy, though he does not mention *Long* by name, articulated in his concurring opinion below the basic proposition that we urge here:

> As the majority notes, the Illinois Appellate Court made no express determination that the claim had been waived. The Illinois court considered the claim on its merits. *Rather than attempting to divine the unspoken "intent" of that court, I think we should invoke a presumption that waiver not clearly found has been condoned.* Waiver, particularly of an ineffective assistance claim on direct appeal, is an essentially technical ground for avoiding very difficult,

> very important and very close issues on the merits. *Certainly it is within the state courts' power to protect their procedural requirements merely by making express findings that a petitioner has waived.*

Harris v. *Reed*, 822 F.2d at 687 (emphasis added). (J.A. at 73.)

Similarly, in *Henry* v. *Wainwright*, 686 F.2d 311 (5th Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983), the Fifth Circuit stated:

> In the situation presented here, where the state courts' opinions do not make it clear that a point is not passed upon due to failure to preserve it by untimely objection, the state must be presumed to have applied its own rules to reach and reject the claim on the merits.
>
> Otherwise, federal habeas review would unjustly be denied a prisoner who had no way of proving that the state courts did consider the merits of his claim. This presumption does not unduly infringe upon the comity considerations underlying *Sykes* and *Isaac* for all a state must do to preclude federal examination of an alleged error, contrary to state procedural rules, is to indicate that it has found the claim to be procedurally barred.

686 F.2d at 314 and n.4. *See also Meadows* v. *Holland*, 831 F.2d 493, 504, 507 (4th Cir. 1987) (*en banc)* (dissenting opinions of Judges Winters and Philips) (rule barring habeas relief due to procedural default available only where clear from plain statement, citing *Long); Mann* v. *Dugger*, 817 F.2d 1471 (11th Cir. 1987) *vacated for rehearing en banc*, 828 F.2d 1498 (11th Cir. 1987) (Clark, J., specially concurring) (applying *Long's* plain statement rule to habeas cases is not unduly burdensome).

Commentators also support application of *Long* to habeas cases as the best method of balancing the policy

interests of *Sykes* with the rights of the state prisoner. Professor Yackle of Boston University School of Law recommends application of *Long's* plain statement rule in federal habeas cases where the state decision is unclear whether it rests on a procedural default:

> By demanding that [state] courts articulate any procedural ground upon which they wish to rest judgment, the federal courts ensure that the prisoner's federal interests are subordinated to the state interests that *Sykes* identified. Federal claims are cut off for the reasons the Supreme Court has found sufficient and not merely because a busy state court failed to reveal its true intentions.

Yackle, *Postconviction Remedies*, § 84, p. 150-51 (Cum. Supp. 1988); *see also*, Note, "Applying *Wainwright* v. *Sykes* to State Alternative Holdings and Summary Affirmances," 53 *Fordham L. Rev.* 1357, 1374-81 (1985) (*Long* should apply to unclear holdings). (Article attached as Exhibit A to Petitioner's Reply Brief in Support of Petition for Certiorari.)

In sum, *Long* provides a simple, workable rule for habeas cases where the basis for state court decisions is unclear or unknown. The alternative is an *ad hoc* approach where federal courts are placed in the difficult position of reviewing state court pleadings and arguments of counsel, interpreting obscure state court decisions, and second-guessing the intent of state court judges. This *ad hoc* approach only adds greater uncertainty and spawns further appeals. It also undermines the *Skyes* policy interests and the vitality of the writ of habeas corpus. Subjecting the Great Writ to the risk of error inherent in the Court of Appeals approach below is incompatible with the high respect afforded the Great Writ by this Court throughout history.

II. THE STATE COURT OPINION BELOW LACKS A PLAIN STATEMENT THAT IT IS BASED ON A PROCEDURAL DEFAULT AND THEREFORE THE MERITS ON THE FEDERAL CONSTITUTION QUESTION SHOULD BE REACHED.

The unpublished state appellate court order in this case discusses both a procedural default and the merits of Petitioner's constitutional claim. (J.A. 9.) In regard to Petitioner's constitutional claim, the order states: "[T]hese matters could have been raised in defendant's direct appeal." (J.A. at 12.) The order next remarks that trial and appellate counsel were different, but then drops any discussion of waiver altogether and never mentions it again, even if the final paragraph which affirms based on the merits of Petitioner's constitutional claim. (J.A. at 12-14.) The order clearly lacks a plain statement that it rests on Petitioner's procedural default.

The District Court below observed that the state appellate court never made an express finding that its affirmance was based on a procedural default. Because the appellate court apparently had excused the procedural default, the District Court held that the merits of Petitioner's constitutional claim should be reviewed. *Harris* v. *Reed*, 608 F. Supp. 1369, 1378 (N.D. Ill. 1985).

On appeal to the Seventh Circuit, the majority also observed that the state court never expressly found that Petitioner wavied his constitutional claim because of the procedural default. *Id.* at 687. Noting that the order is ambiguous because it addresses claims that might have been waived, the majority attempted to divine what the state probably intended. *Id.* Ultimately, however, the majority could do no more than state what the order "suggested." *Id.*

Interpreting ambiguity is risky when a petitioner's last chance to assert a constitutional right is at stake. Here,

the District Court interpreted the ambiguous order one way; the majority on appeal interpreted it another way. Petitioner's case provides a palpable example of the problems inherent in allowing federal courts free rein to search inscrutable state court decisions for adequate and independent state grounds. The plain statement rule of *Long* avoids these problems. The rule should be extended to habeas cases and applied here to reverse the decision of the Court of Appeals below.

Petitioner recognizes that the merits of his ineffective assistance claim are not before this Court. Yet it should be mentioned that Petitioner has maintained his innocence from the outset. When his trial counsel never produced the two witnesses promised in opening statement, the jury was left with the impression that something was terribly wrong with this defense. The jury virtually was invited to convict. Later, his public appellate counsel never raised ineffective assistance of counsel on direct appeal.[6] These facts raise a substantial question whether Petitioner's conviction rests on a trial that falls below minimal constitutional standards. Constitutional errors of such gravity should not be lost for federal review in the ambiguity of an unpublished state court order. Here, the

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[6] Petitioner never had a hearing or any other opportunity to show "cause and prejudice" for his procedural default. The District Court found that his procedural default had been excused by the state court, and thus held a hearing only on the merits of Petitioner's ineffective assistance of counsel claim. The Court of Appeals then concluded that the state court probably did not intend to excuse the procedural default. The Court of Appeals, however, did not remand for a hearing on whether Petitioner could show "cause and prejudice" under *Wainwright* v. *Sykes*. *See Preston* v. *Maggio*, 705 F.2d 113, 117 (5th Cir. 1983) (after finding state procedural default, court remands for hearing on cause and prejudice).

state court order lacks a plain statement that it rests on Petitioner's procedural default. Thus, Petitioner is entitled to full federal review of the state court's order regarding the merits of his constitutional claim.

CONCLUSION

Petitioner respectfully requests that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed and the cause remanded to that court for consideration of the merits of Petitioner's constitutional claim.

Respectfully submitted,

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